(2)

No. 03-910

Supreme Court, U.S.
FILED
MAR 2 3 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LARRY LEAKE, in His Official Capacity as Chairman of the North Carolina State Board of Elections, *et al.*,

Petitioners,

v.

NORTH CAROLINA RIGHT TO LIFE, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief in Opposition to Petition for Writ of Certiorari

James Bopp, Jr.
Counsel of Record
Eric C. Bohnet
JAMES MADISON CENTER
FOR FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, Indiana 47807
(812) 232-2434

Counsel for Respondents

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

Questions Presented

I. Whether a statute is void for vagueness when it regulates the financing of communications based upon their "essential nature" and looks to a series of contextual factors to determine how the communication would be interpreted by a reasonable person.

II. Whether the Constitution permits an association to be presumed subject to comprehensive political committee regulations based solely upon a $3,000 expenditure.

III. Whether the Constitution permits a state to limit contributions to independent expenditure committees that do not contribute to candidate.

Corporate Disclosure Statement

Respondent North Carolina Right to Life, Inc. is a parent company of Respondents North Carolina Right to Life Political Action Committee and North Carolina Right to Life Committee Fund for Independent Political Expenditures. There are no other parent corporations for any respondent, and no publicly held company owns ten percent or more of the stock of any of the respondents. Rule 29.6.

Table of Contents

Page

Questions Presented i

Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities vi

Argument 1

I. The Context Prong of N.C. Gen Stat. § 163-278.14A Is Void For Vagueness 4

A. Vagueness Is Not Permitted in Content-Based Regulation of Political Speech 4

B. North Carolina's Context Prong Is Unconstitutionally Vague 6

C. Partial Severance of the Context Prong Does Not Cure Its Vagueness 9

II. The Fourth Circuit Properly Held That North Carolina May Not Presume Political Committee Regulations Based On A Flat Monetary Standard Without Analysis of the Organization's Overall Purpose 11

A. Only Organizations Whose Major Purpose Is Candidate Advocacy May Be Subjected To Comprehensive Organization-Wide Regulation 12

B. North Carolina's Political Committee Definition Violates the Major Purpose Test by Imposing Organization-Wide Regulations Without Reference to the Organization's Actual Purposes 13

C. This Definition Is also Unconstitutionally Vague Because It is Not Based on an Organization's Principal Purpose 15

D. A $3,000 Threshold Is Too Low and Would Ensnare Even the Organization Found Not to Be a Political Committee in *MCFL* 16

III. The Fourth Circuit Properly Found That North Carolina Lacks Justification to Limit Contributions to Independent Expenditure Committees that Do Not Contribute to Candidates 17

A. Because IEPACs Do Not Contribute to Candidates, the State Lacks Justification for Limiting Contributions to Such Entities 18

B. Political Committees Lack the Close Relationship to Candidates that Justified Regulation of Political Parties and Their Candidates in *McConnell* 21

C. The State Has Not Shown Any Realistic Threat Of Corruption that May Be Reduced By Limiting Contributions to IEPACs 22

Conclusion 25

Table of Authorities

Page

Cases

Anderson v. Spear,
356 F.3d 651,
2004 U.S. App. LEXIS 586 (6th Cir. 2004) 5

Buckley v. Valeo,
424 U.S. 1 (1976) ..... *Passim*

California Medical Association v. FEC,
453 U.S. 182 (1981) 19

Citizens Against Rent Control v. City of Berkeley,
454 U.S. 290 (1981) 19, 20

Colorado Republican Federal Election Campaign Committee v. FEC,
518 U.S. 604 (1996) 20

FEC v. Massachusetts Citizens for Life, Inc.,
479 US 238 (1986) ..... *Passim*

FEC v. National Conservative Political Action Committee,
470 U.S. 499 (1985) 19, 24

Kolender v. Lawson,
461 U.S. 352 (1983) 5

Lawrence v. Chater,
516 U.S. 163 (1996) 1, 3, 25

Lincoln Club of Orange County v. City of Irvine,
292 F.3d 934 (9th Cir. 2002) 24

McConnell v. FEC,
124 S. Ct. 619 (2003) ..... *Passim*

North Carolina Right to Life, Inc. v. Leake,
344 F.3d 418 (4th Cir. 2003) ..... *Passim*

Perry v. Bartlett,
231 F.3d 155 (4th Cir. 2000) 22-23

Riley v. National Federation of the Blind,
487 U.S. 781 (1988) 15

Virginia v. Black,
538 U.S. 343, 123 S. Ct. 1536 (2003) 14

Constitutional Provisions

U.S. CONST. amend. I 4, 14, 15

Statutes

N.C. Gen. Stat. § 163-278.6(14) 11, 14, 15

N.C. Gen. Stat. § 163-278.13(b) 14

N.C. Gen Stat. § 163-278.14A 4

N.C. Gen. Stat. § 163-278.14A(a) 6

N.C. Gen. Stat. § 163-278.14A(a)(1) 10

N.C. Gen. Stat. § 163-278.14A(a)(2) 4, 9

Argument

The state implicitly concedes that this case does not merit full review by this Court, and instead asks only that the matter be remanded to the lower court for further consideration in light of this Court's recent decision in *McConnell v. FEC*, 124 S. Ct. 619 (2003). Such a procedure is one that "should be exercised sparingly." *Lawrence v. Chater*, 516 U.S. 163, 173 (1996). It is potentially appropriate only when

> intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.

Id. at 167.

No such probability exists here because the Fourth Circuit's analysis and holdings are fully consistent with those announced by this Court in *McConnell*. There were three basic holdings in the lower court on which the state now seeks review: (1) The context prong of North Carolina's expenditure definition failed to provide a bright line "unconstitutionally shifts the determination of what is 'express advocacy' away from the words in and of themselves to the unpredictability of audience interpretation" *North Carolina Right to Life, Inc. v. Leake*, 344 F.3d 418, 428 (4th Cir. 2003). (2) The state's $3,000 major purpose presumption was substantially

overbroad and invalid because it is "based entirely on a monetary standard completely untethered from the other factors identified by the Supreme Court in determining major purposes." *Id.* at 433. And (3) That a limit on the size of contributions to independent expenditure committees ("IEPACs") was unconstitutional because "the corruptive influence of contributions for independent expenditures is more novel and implausible than that posed by contributions to candidates" and that the state had "failed to proffer sufficiently convincing evidence . . . that there is a danger of corruption due to the presence of unchecked contributions to IEPACs." *Id.* at 434.

None of these issues was addressed in *McConnell*. Although several principles were discussed in both cases, these had been well established by prior cases and *McConnell* simply re-affirmed the authorities relied upon by the Fourth Circuit here. For example, the express advocacy test was discussed in both cases, with the Fourth Circuit striking down North Carolina's laws based upon vagueness concerns described by this Court in *Buckley v. Valeo*, 424 U.S. 1, 43 (1976). *NCRL*, 344 F.3d at 427. While this Court upheld the statute it analyzed, it was able to do so only because the clearly delineated federal statute "raises none of the vagueness concerns that drove our analysis in *Buckley*." *McConnell*, 124 S. Ct. at 689.

The *McConnell* decision also re-affirmed several of the principles that underlay the Fourth Circuit's decision on the IEPAC issue: the level of scrutiny for contributions limits, the lack of corruptive potential from independent expenditures, and the connection between the plausibility of a legislative judgment and

the state's evidentiary burden to support it. *Compare McConnell*, 124 S. Ct. at 655-656, 705, 711 *with NCRL*, 344 F.3d at 433-434.

With regards to the major purpose presumption issue, there is no overlap even of underlying principles. Although the state claims the *McConnell* decision enhances the deference to which the legislative decision is due, Cert. Petition at 13, 20, the section of the opinion to which they cite actually says nothing about deferring to legislative judgment. *See McConnell*, 124 S. Ct. at 690-693. Although this Court did defer to Congressional expertise with regards to matters such as how the close relationship between political parties and their candidates might be used to influence elections, *McConnell*, 124 S. Ct. at 673, there is nothing to recommend deference to the legislature's judgment concerning the operations and purposes of independent citizens' groups at issue here. Simply because this Court deferred to a co-equal branch of the federal government on a particular legislative finding, based on a massive evidentiary record, does not indicate a *carte blanche* deference to any and all unrelated campaign finance regulation that a state legislature may enact.

Because *McConnell* does not contradict the Fourth Circuit's holdings or undermine its analysis, there is no basis to conclude that a re-evaluation of this case would alter its outcome, and therefore is no basis on which to vacate and remand. *See Lawrence*, 516 U.S. at 167. Since the existing decision is also fully consistent with prior decisions of this Court and does not conflict with the decisions of any other federal circuit, the state's petition should be denied.

I. The Context Prong of N.C. Gen Stat. § 163-278.14A Is Void For Vagueness.

The content definition at issue here, N.C. Gen. Stat. § 163-278.14A(a)(2), is unconstitutionally vague, and is therefore unaffected by this Court's recent upholding of the federal "electioneering communication" provision that this Court said "raises none of the vagueness concerns that drove our analysis in *Buckley*." *McConnell v. FEC*, 124 S. Ct. 619, 689 (2003). Although the Fourth Circuit found the statute at issue here to be unconstitutional on both vagueness and overbreadth grounds for violating *Buckley*'s express advocacy test, its analysis focused heavily on vagueness concerns necessitating a "bright-line standard." *NCRL*, 344 F.3d at 424-428. Since either vagueness or overbreadth would be sufficient grounds for striking a restriction on First Amendment rights, this statute's vagueness renders any impact of *McConnell*'s overbreadth analysis irrelevant.

A. Vagueness Is Not Permitted in Content-Based Regulation of Political Speech.

In both *Buckley* and *McConnell*, this Court recognized that definitions triggering campaign finance restrictions must "avoid problems of vagueness and overbreadth." *McConnell*, 124 S. Ct. at 688. In *Buckley*, the principal problem was vagueness, which cannot be tolerated in restrictions of First Amendment activity because "vague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to steer far wider of the unlawful zone.'"

Buckley, 424 U.S. at 41 n. 48 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)). Hence, a statute is void for vagueness if it fails to define the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In addressing the constitutional use of such phrases as "relative to," *Buckley*, 424 U.S. at 41, "advocating the election or defeat," *id.* at 42, "for the purpose of . . . influencing," *id.* at 78, or "in connection with any election," *MCFL*, 479 U.S. at 248-249, this Court found that the constitutional deficiencies of vagueness "can be avoided only by reading [the statute] as limited to communications that include explicit words of advocacy." *Buckley*, 424 U.S. at 43, 80; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

In *McConnell*, however, vagueness was not an issue because the statutory reach was defined by an elaborate but clear series of standards which raised only questions of overbreadth. *McConnell*, 124 S. Ct. at 688. This new decision thereby approved the federal statute as a constitutionally acceptable alternative to *Buckley*'s express advocacy test, but did not alter *Buckley*'s approach to vagueness. As the Sixth Circuit has since explained, *McConnell* "left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth." *Anderson v. Spear*, 356 F.3d 651, 2004 U.S. App. LEXIS 586 at 36 (6th Cir. 2004). Together, *Buckley* and *McConnell* provide state's with two choices for the regulation of campaign finance expenditures: they can

either use the express advocacy test, or they can utilize a somewhat broader content delineation if the excessive scope is narrowed to "the functional equivalent of express advocacy" through clearly defined requirements for timing, media, and audience. *McConnell*, 124 S. Ct. at 696.

B. North Carolina's Context Prong Is Unconstitutionally Vague

Here, North Carolina's statutory definition, § 163-278.14A(a) attempts what may be called a *Buckley*-plus approach as its first subsection codifies *Buckley*'s express advocacy test by providing a comprehensive list of the types of campaign speech that plainly and necessarily expressly advocate the election or defeat of a candidate. Plaintiffs do not challenge this first subsection, but they do challenge to statute's context prong, subsection(2), which seeks to regulate additional communications according to how the general public may perceive their "essential nature." This determination, in turn, is to be made by weighing a series of contextual factors according to a "reasonable person" standard of interpretation. Essentially, the definition erases the bright line of the express advocacy test by reaching beyond it to encompass whatever communications can be viewed as triggering the state's interest.

This approach differs dramatically from the "electioneering communication" upheld in *McConnell*. In that case, the federal statute utilized a clear content delineation which was then narrowed by a series of clearly-defined contextual limitations: the provision would apply only to "(1) a broadcast (2) clearly

identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identifiable audience of at least 50,000 viewers or listeners." *McConnell*, 124 S. Ct. at 689. As this Court noted, "[t]hese components are both easily understood and objectively determinable," so that "the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite here." *Id.* Basically, the statute sets up a series of clearly-defined "safe harbors" within which communications can be made without threat of regulation.

In contrast, North Carolina's statute provides little safety to anyone wishing to discuss contemporary political issues. Its reliance on how a communication would be perceived by the general public or by a reasonable person ignores this Court's warning that such criteria "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion . . . . It compels the speaker to hedge and trim." *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

Although the statute in question here looks at many of the same types of factors as the federal "electioneering communication," it utterly fails to define when or how these factors might apply. For example, the federal statute sets a specific time frame for its application: 60 days before a general election or 30 days before a primary. *McConnell*, 124 S. Ct. at 687. A speaker can avoid regulation by simply timing his ad to run 61 days before the election. In contrast, North

Carolina's statute provides no concrete time limit, but looks broadly to "the timing of the communication in relation to events of the day." Though this may include proximity to an election, there is nothing in this statute to prevent enforcement against communications made 61, 120, or even 500 days before an election, and also nothing to require enforcement against communications made a week before election day. Perhaps a mailing that touts a candidate's tax proposals will be viewed as electoral in nature if sent when the candidate kicks off his campaign a year before the election, but not electoral if sent a few weeks before the election while the proposal is pending in the legislature. Or perhaps the proximity to the election will control so that only the second mailing would be viewed as electoral. Or perhaps both will be electoral, or neither of them–a speaker can only guess.

Similarly, a communication that reaches fewer than 50,000 persons in the candidate's district is off limits to the federal regulation, *McConnell*, 124 S. Ct. at 687, but North Carolina's context prong balances whether it is distributed to "a significant number of registered voters." Is 20,000 voters a significant number? Is 1,000? 100? Does it matter if the communication is also distributed outside the district? The statute again does not answer these critical questions. Moreover, none of these factors are mandatory but are simply among those which "may be considered," so even communications with insignificant distribution to the candidate's constituents might still trigger regulation based upon other factors.

The potential for discriminatory enforcement of such a scheme is obvious. A partisan prosecutor could easily focus on factors that would justify enforcement actions against his opponents while exempting friendly ads from prosecution. Perhaps a "Smith is bad for farmers" mailing will be deemed electoral in nature while "Smith is good for business" radio ads will be allowed because they ran a week farther from the election, or because they reached fewer of Smith's constituents.

C. Partial Severance of the Context Prong Does Not Cure Its Vagueness.

Nor do these problems permit the retention of the first sentence of § 163-278.14A(a)(2), as suggested by Judge Michael in partial dissent. *See NCRL*, 344 F.3d at 435-437 (Michael, J., concurring in part and dissenting in part). Although this approach would take out some of the more vague aspects of this statute, this first sentence still raises ambiguous questions of when a communication's "essential nature expresses electoral advocacy to the general public" and what is meant by "directs voters to take some action to nominate, elect, or defeat a candidate in an election."

The problem is similar to one already addressed by this Court in rejecting an "advocating the election or defeat" test. *Buckley*, 424 U.S. at 42. Because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application" this Court held that sufficient clarity in this definition could only be achieved if the statute's scope were "limited to communications that include explicit words of

advocacy." *Id.* at 43. Here as well, many communications that do not contain explicit words of advocacy will be susceptible to interpretation either as an issue discussion or as candidate advocacy. For example, does a plea to "stop Governor Smith from raising taxes" advocate that the hearers vote against Governor Smith, join an anti-tax rally, or call their legislators?

This first sentence of subsection (2) cannot be saved by a narrowing construction because the only one available, i.e., explicit words of advocacy, is already codified in subsection (1). This first provision provides an exhaustive list of phrases that may constitute explicit words of advocacy. § 163-278.14A(a)(1). It incorporates all of the examples provided by this Court in *Buckley*, 424 U.S. at 44 n.52, plus the two-step "vote pro-life, Smith is pro-life" advocacy described in *MCFL*, 479 U.S. at 249. It then adds a third category of campaign slogans such as "Smith's the One." Notably, this list is prefaced by "phrases such as," so that other forms of explicit advocacy like "Smith for North Carolina" or "Send Smith packing on November 8" would be covered by this section even though they are not specifically listed.

Because express advocacy is already regulated by subsection (1), the only communications that might be subjected to regulation only by subsection (2) are necessarily those that do not contain explicit words of advocacy and whose meanings are therefore subject to uncertain interpretation. Hence, any effort to construe this section in a way that avoids vagueness would necessarily render it redundant with subsection (1).

In conclusion, North Carolina's current attempt to reach beyond explicit words of advocacy sets an ambiguous standard that must be struck down as unconstitutionally vague. If the state legislature wishes to regulate communications that are "the functional equivalent of express advocacy," this Court's recent decision provides a roadmap showing how narrow and well-defined boundaries can be used to achieve this purpose. *McConnell*, 124 S. Ct. at 696. However, its current attempt does not follow this approach and the lower court's decision to strike it down should be allowed to stand.

II. The Fourth Circuit Properly Held That North Carolina May Not Presume Political Committee Regulations Based On A Flat Monetary Standard Without Analysis of the Organization's Overall Purpose.

Plaintiffs also challenged a portion of North Carolina's political committee definition, N.C. Gen. Stat. § 163-278.6(14), under which associations making $3,000 in expenditures or contributions are presumed to have the major purpose of supporting or opposing candidates, and are thereby subjected to comprehensive organizational and reporting requirements as a political committee. The Fourth Circuit properly struck down this presumption because it is "based entirely on a monetary standard completely untethered from the other factors identified by the Supreme Court in determining major purposes." *NCRL*, 344 F.3d at 433.

A. Only Organizations Whose Major Purpose Is Candidate Advocacy May Be Subjected To Comprehensive Organization-Wide Regulation.

The major purpose test plays an important role in campaign finance law because it allows comprehensive regulation of organizations that exist to promote candidates and whose entire operations are therefore inherently political, while protecting organizations that exist principally for other purposes and which can therefore be regulated only to the extent of their electoral advocacy. This test was first announced in *Buckley*, when this Court allowed the federal government to compel disclosure of all expenditures by political committees whose "major purpose . . . is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79. Regardless of the content of specific communications, all of such an organization's expenditures "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Buckley*, 424 U.S. at 79. In contrast, expenditures by other groups could be regulated only with regard to the specific "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 79-80.

This distinction between expenditure-specific and organization-wide regulations was again illustrated in *MCFL*, 479 U.S. 238, which involved a non-profit educational organization whose "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." Because of its electoral activities, it was

found to be subject to requirements that it disclose the amounts it spent on independent expenditures and the amount contributed for that purpose. *Id.* at 262. This Court also noted that should "independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262. In that event, "it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns." *Id.* at 263.

Based upon these precedents, the Fourth Circuit properly concluded that a constitutionally acceptable standard for political committee-type regulation should look to "an entity's stated purpose, which is typically reflected in its articles of incorporation, and the extent of an entity's activities and funding devoted to pure issue advocacy versus electoral advocacy." *NCRL*, 344 F.3d at 430. It also noted that this Court in *MCFL* had considered the organization's "legislative and public demonstration activities, how it raised its finances, and its publications" before determining its major purpose. *NCRL*, 344 F.3d at 430 n.4.

B. North Carolina's Political Committee Definition Violates the Major Purpose Test by Imposing Organization-Wide Regulations Without Reference to the Organization's Actual Purposes.

Like the federal schemes reviewed in *Buckley* and *MCFL*, North Carolina's statutes also impose comprehensive organization-based burdens on organizations deemed to be political committees. As

the court below summarized the state's regulations, "[a] political committee is required to appoint a treasurer, file a statement of organization, maintain detailed accounts of all contributions received and expenditures made, and file periodic statements with the State Board of Elections." *NCRL*, 344 F.3d at 423-424. Political committee status also triggers limits on the size of contributions that an organization may accept. § 163-278.13(b).

Unfortunately, these organization-wide burdens are not matched to organizational criteria for their imposition, but can instead be triggered by the making of a single expenditure costing a tiny fraction of the organization's resources. Under § 163-278.6(14), any entity is "rebuttably presumed to have as a major purpose to support or oppose the nomination or election of . . . candidates if it contributes or expends . . . more than three thousand dollars." As the Fourth Circuit properly explained, this standard, "is based on an arbitrary level of spending that bears no relation to the idiosyncracies of the entity." *NCRL*, 344 F.3d at 430.

Although the presumption is rebuttable, and the state claims to retain the burden of proof, a plurality of this Court made clear last term that such a presumption violates the First Amendment when used to blur a constitutionally-mandated distinction because it "permits a jury to convict in every [] case in which defendants exercise their constitutional right not to put on a defense." *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 1550 (2003). At minimum, such a presumption "makes it more likely" that the offense will be established "regardless of the particular facts of the case." *Id.*

This Court has also struck down similar presumptions because they subjected persons exercising First Amendment rights to potential litigation in which they would "bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder." *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988). Such a scheme, "must necessarily chill speech in direct contravention of the First Amendment's dictates." *Id.*

Such concerns are certainly applicable here where the presumption allows the prosecution to establish an organization's major purpose without actually examining the organization's purposes. Rather than determining an organization's major purpose by comparing its electoral activities with its overall activities, this presumption looks only at the electoral activity and forces the organization to prove that they "were not a major part of activities of the organization during the election cycle." § 163-278.6(14).

C. This Definition Is also Unconstitutionally Vague Because It is Not Based on an Organization's Principal Purpose.

Additionally, this rebuttal provision also raises serious vagueness problems. While this Court has always spoken of "*the* major purpose," *Buckley*, 424 U.S. at 79 (emphasis added), or a groups' "primary objective," *MCFL*, 479 U.S. at 263, North Carolina's statute speaks of "*a* major purpose" and provides for showing that electoral activities were not "*a* major part". The former descriptions look at the organization's foremost or principal objective while the

latter suggests only significance. As the state explains in its current petition, the statute deliberately avoids providing a concrete standard for determining what is or is not a major purpose of an organization. Cert. Petition at 17-19. Even if an organization were to prove that its $3,001 electoral expenditure was dwarfed by the $10 million it spent on educational ads, there is nothing in this statute to preclude a finding that the $3,001 nonetheless comprised "a major part" of its activities. Indeed, such a finding would logically follow from the statute's focus on the potential impact on campaigns rather than the overall character of the speaking entity. See Cert. Petition at 14-15.

Such ambiguity fails to provide potential speakers with security to speak without fear of being subjected to comprehensive and restrictive regulations. The only safe means of avoiding potential enforcement is by limiting expenditures and contributions to less than $3,000. As discussed in Section I, *supra*, such ambiguity renders the statute unconstitutionally vague. *See Buckley*, 424 U.S. at 41.

D. A $3,000 Threshold Is Too Low and Would Ensnare Even the Organization Found Not to Be a Political Committee in *MCFL*.

Finally, even if an organization's major purpose could be measured by some level of flat monetary threshold, such a threshold would need to be far higher than the $3,000 set by North Carolina. In *MCFL* the organization at issue spent $9,812.76 to print and distribute an express advocacy communication, yet it was "undisputed on this record" that the organization

in question did not have "the major purpose of . . . the nomination or election of a candidate." *MCFL*, 479 U.S. at 244, 249, 252 n.6. Of course, the impact of such spending was far greater when it was made in 1978 that it would be now-back then it purchased the printing of over 100,000 copies of a newsletter and postage costs to mail 56,000 of them. *Id.* at 243-44, 249. Obviously, a presumption of major purpose cannot be supported by a mere $3,000 expenditure.

Because the Fourth Circuit properly followed the precedence of this Court, and does not conflict with the case law of any federal circuit, there is no need for this review by this Court.

III. The Fourth Circuit Properly Found That North Carolina Lacks Justification to Limit Contributions to Independent Expenditure Committees that Do Not Contribute to Candidates.

Both the District Court and the Fourth Circuit found that the state lacked justification for limiting the size of contributions made to independent expenditure committees ("IEPACs") because the compelling interest in combating corruption was insufficiently supported by limits on contributions that could not flow to a candidate. There is no need for Supreme Court intervention on this issue because the Fourth Circuit followed the well-established analysis that this Court has consistently applied to contribution limits, under which such limits "require less compelling justification than restrictions on independent spending" and can therefore survive "if the Government demonstrates that contribution regulation is 'closely drawn' to match

a 'sufficiently important interest.'" *NCRL*, 344 F.3d at 433 (quoting *Shrink PAC*, 528 U.S. at 387-88 (quoting *Buckley*, 424 U.S. at 25)). This standard has since been re-affirmed by this Court. *McConnell*, 124 S. Ct. at 655-656, 711.

A. Because IEPACs Do Not Contribute to Candidates, the State Lacks Justification for Limiting Contributions to Such Entities.

McConnell also re-affirmed the basis for distinguishing contributions to IEPACs from contributions that may ultimately flow to candidates,

> independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Id. at 705 (quoting *Buckley*, 424 U.S. at 47). The Fourth Circuit used a segment of this precise quote as the foundation of its distinction. *See NCRL*, 344 F.3d at 433-434 (quoting *Buckley*, 424 U.S. at 47).

Because of the diminished potential for corruption when moneys are spent independently by third parties, the anti-corruption rationale for contribution limits evaporates where the money never reaches the candidate. Hence, when this Court upheld limits on contributions to multi-candidate PACs, Justice Blackmun emphasized that the result would be different if a limit "were applied to contributions to a political committee established for the purpose of making independent expenditures." *California Medical Association v. FEC*, 453 U.S. 182, 203 (1981) (Blackmun, J., concurring). As he explained the distinction, "[m]ulticandidate political committees are . . . essentially conduits for contributions to candidates, and as such . . . pose a perceived threat of actual or potential corruption. In contrast, contributions to a committee that makes only independent expenditures pose no such threat." *Id.* at 203.

Although no majority decision of this Court has directly addressed the constitutionality of contributions to IEPACs, it has struck down limits on contributions to ballot measure committees because they lacked the anti-corruption justification that supported limitations on contributions to candidates. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981). It has also found that there is a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *FEC v. National Conservative Political Action Committee*, 470 U.S. 499, 497 (1985). This Court has also recognized that contributions to independent speakers are even less dangerous than independent speech itself: "an

independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same . . . independent expenditure made directly by that donor." *Colorado Republican Federal Election Campaign Committee v. FEC*, 518 U.S. 604, 617 (1996). Since these contributions are therefore less threatening than an activity that this Court has recognized as posing too little threat of corruption to support limitation, *e.g. McConnell*, 124 S. Ct. at 705, the Fourth Circuit was undoubtably correct in concluding that "the corruptive influence of contributions for independent expenditures is more novel and implausible than that posed by contributions to candidates." *NCRL*, 344 F.3d at 434.

Moreover, allowing limits on contributions to IEPACs would create an illogical discrimination against those who wish to associate with others to fund independent expenditures through a committee rather than as individuals. This Court has recognized the unconstitutionality of such a scheme in a similar context because "[t]o place . . . any limit on individuals wishing to band together . . . while placing none on individuals acting alone, is clearly a restraint on the right of association," which "cannot be allowed to hobble the collective expressions of a group." *Citizens Against Rent Control*, 454 U.S. at 296. Hence, there can be no basis for prohibiting persons from pooling $4,001 with others to enable a political committee to run ads while allowing the individuals each to spend millions of dollars to run the same ad.

B. Political Committees Lack the Close Relationship to Candidates that Justified Regulation of Political Parties and Their Candidates in *McConnell*.

The state's petition ignores this Court's repeated decisions finding limitations on independent expenditures to be unsupported by the state's anti-corruption interest, and instead seeks "considerable deference to the legislative effort" to prevent circumvention of other limitations, citing as an example *McConnell*'s upholding of restrictions on state candidates who run ads supporting or opposing federal candidates. Cert. Petition at 21.

But the corruptive potential of state candidates who promote federal candidates is easily distinguished from that of unaffiliated IEPACs like NCRL-FIPE. First of all, the federal restrictions on state candidates was predicated and justified because of the close relationship between a political party and its candidates. *McConnell*, 124 S. Ct. at 684. Such parties and candidates "enjoy a special relationship and unity of interest" which places parties "in a unique position . . . to serve as 'agents for spending on behalf of those who seek to produce obligated officeholders.'" *Id.* at 661 (quoting *Colorado II*, 533 U.S. at 452). This Court sharply distinguished the "real-world differences between political parties and interest groups," explaining that "[i]nterest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses." *Id.* at 687. In contrast, "[p]olitical parties have influence and power in the legislature that vastly

exceeds that of any interest group. It is hardly surprising . . . that parties in turn have special access to and relationships with federal officeholders." *Id.* There is a good deal of plausibility to the scenario that a political party with close influence over both federal and state candidates could facilitate circumvention of the federal candidate's contribution limit by funneling funds to a state candidate who would use them to finance an ad campaign to aid his partisan compatriot. Of course, the close relationship between party and candidate also diminishes the risk of counterproductive ads and increases the likelihood that the expenditure will be welcomed and rewarded by the candidate.

C. The State Has Not Shown Any Realistic Threat Of Corruption that May Be Reduced By Limiting Contributions to IEPACs

There are also glaring weaknesses in the state's evidentiary support for its claims, which consists of a single episode described in deposition testimony, "an instance in which an organization known as Farmers for Fairness threatened . . . that it would run advertisements against certain vulnerable legislators in retaliation for votes against the hog industry." Cert. Petition at 21-22. Notably, the deponent was not a member of the legislature and there is nothing to suggest that the legislature enacted the challenged statute to address the concerns he raises. In fact, it is doubtful that the challenged limit would even have been applicable–Farmers for Fairness established in prior litigation that it was not a political committee and did not make regulable expenditures. *See Perry v.*

Bartlett, 231 F.3d 155 (4th Cir. 2000). If anything, this example serves as confirmation of this Court's warning that limitations on expenditures "could not be justified as a means of avoiding circumvention of contribution limits" where "its restrictions could easily be evaded." *McConnell*, 124 S. Ct. at 702-703.

The state's example also fails to show any triggering of the state's anti-corruption interest. This interest encompasses not only *quid pro quo* exchanges of money for favors, but also "extend[s] to the broader threat from politicians too compliant with the wishes of large contributors." *Id.* at 660 (quoting *Shrink PAC*, 528 U.S. at 389). Here, however, the Farmers group is not alleged to have offered rewards but to have threatened opposition. In other words, if the legislators acted against the interests of hog farmers, Farmers for Fairness would make communications in agricultural districts to let hog farmers know about it–a seemingly reasonable proposition. Such an arrangement necessarily excludes the money-for favors appearances that justify restraints on contributions that flow to candidates–the money is being spent against the wishes of the candidate in a position to grant favors. Moreover, such a rationale appears to be a thinly-veiled attempt to insulate incumbents, since they will normally be the ones in position to ward off the unwanted campaigns by acceding to the interest group's demands. As Justice Breyer has warned, "we should not defer" if a limit "insulates legislators from effective electoral challenge." *Shrink PAC*, 528 U.S. at 404 (Breyer, J., concurring).

Additionally, the state's claims regarding Farmers For Fairness are not based upon the size of the

contributions made to the organization, but to the size of the expenditures themselves. As such, this evidence does not support the constitutionality of limits on contributions to an IEPAC. At most, the anecdote suggests the type of supposed corruption from independent expenditures by political committees that this Court has already rejected because "the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger" of corruption. *NCPAC*, 470 U.S. at 498. Even if there were a danger of corruption from committees making large expenditures, limits on contribution to the committees would address the problem only by starving the committees of funding for their communications. Such a cure would only give rise to another disease since this Court has consistently maintained that contribution limits posed additional constitutional problems if set so low that they "prevent . . . political committees from amassing the resources necessary for effective advocacy." *McConnell*, 124 S. Ct. at 655-656 (quoting *Buckley*, 424 U.S. at 21). Since limiting contributions to IEPACs can only address expenditure-related corruption to the extent that they prevent such amassment of resources, they cannot be constitutionally used for this purpose.

In sum, the Fourth Circuit's decision is fully consistent with *McConnell*, and in many aspects is actually buttressed by the new decision. There is also no conflict with decisions of other circuits. Rather, the only other federal court to discuss the constitutionality of limiting contributions to an IEPAC reached a consistent result. *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934 (9th Cir. 2002).

Conclusion

This Court's recent decision in *McConnell* does not undermine the Fourth Circuit's decision in this case, but in many regards actually re-affirms the principles on which the lower court's decision was based. There is no "premise that the lower court would reject if given the opportunity for further consideration," and no "reasonable probability" that "such a redetermination may determine the ultimate outcome of the litigation," and hence no reason to vacate and remand the decision for re-consideration. *See Lawrence*, 516 U.S. at 167. The state's petition should therefore be denied.

Respectfully submitted,

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Eric C. Bohnet
JAMES MADISON CENTER FOR FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434 (fax: 812/235-3685)
Counsel for Respondents